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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 485

GABRIEL TOOMBS, APPELLANT,

vs.

CITIZENS BANK OF WAYNESBORO

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

FILED NOVEMBER 18, 1929

(34,616)

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SUPREME COURT OF THE UNITED STATES

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[fols. a & 1]

IN SUPREME COURT OF GEORGIA

ORDER ALLOWING APPEAL—Filed Oct. 17, 1929

On reading the above and foregoing petition for appeal of Gabriel Toombs and consideration of the assignment of errors presented therewith it is ordered that the appeal as prayed for be and is hereby allowed. And it appearing to the court that a citation was duly served as provided by law it is ordered said Gabriel Toombs shall give bond with [fols. 2 & 3] good security in the sum of fifteen hundred dollars ($1500.00) and upon the filing of such bond with the clerk of the Supreme Court of Georgia this appeal shall operate as a supersedeas. Said bond in said sum of fifteen hundred dollars ($1500.00) shall cover the bond for costs.

This 15th day of October, 1929.

Richard B. Russell, Chief Justice Supreme Court of Georgia.

[File endorsement omitted]

[fol. 4] IN SUPREME COURT OF GEORGIA, OCTOBER TERM, 1928

No. 6876

GABRIEL TOOMBS, Appellant,

vs.

CITIZENS BANK OF WAYNESBORO, Appellee

ASSIGNMENTS OF ERROR—Filed Oct. 17, 1929

Now comes the appellant, Gabriel Toombs, by his attorney, W. A. Slaton, and in connection with his petition for appeal says that in the record proceedings and in the final decree aforesaid manifest error has intervened to the prejudice of appellant, to wit:

1. The court erred in not holding that sections 1, 2, and 3 or article 6 of the act of August 16, 1919, creating the department of banking (Acts 1919, pp. 135, 152) as amended by the act of August 26, 1925 (Acts 1925, pp. 119, 126) were unconstitutional and void because they violate the due process clauses of the State and Federal constitutions to wit, the fourteenth amendment to the constitution of the United States, because said sections do not provide for notice to be given to each stockholder of the special meeting of stockholders at which assessments provided for in said sections of said statutes are required to be made.

2. The court erred in holding that sections 1, 2, and 3, of article VI of the act of August 16, 1919, creating the department of banking (Acts 1919, pp. 135, 152) as amended by the act of August 26, 1925 (Acts 1925, pp. 119, 126) were constitutional and valid, and did not contravene the provisions of the fourteenth amendment to the constitution of the United States, by denying to appellant Gabriel Toombs due process of law, because at the time said Gabriel Toombs acquired his stock in Citizens Bank of Waynesboro, the only provision of the laws of Georgia which authorized an assessment by stockholders upon themselves being the provisions of the act of December 16, 1895 which provided that upon a determination by the State bank examiner that the capital stock of a bank was impaired, the bank should be required [fol. 5] to levy an assessment to restore its capital, and the only penalty provided by said statute being that on the failure to levy such assessment, the Governor should proceed to forfeit the charter of said bank, and by the act of August 16, 1919 (Acts 1919, pp. 132, 152) as amended by the act of August 26, 1925 (Acts 1925, pp. 119, 126) the General Assembly of Georgia having provided that upon a determination by the superintendent of banks that the capital of a bank had been impaired as much as ten per cent. the officers of said bank should call a meeting of the stockholders of said bank, at which special meeting a quorum should consist of a majority only of the stock outstanding, and under said statute a majority of the quorum present, at such meeting, which majority of such quorum might be a minority of the total stock outstanding, was authorized by their vote to levy an assessment on all the stockholders, and

after the levy of such assessment, said bank being authorized at its option to sue the stockholder for the full amount of said assessment, recover a judgment therefor and subject all of the property of the stockholder against whom such assessment had been levied to the payment of the same was a denial of due process of law to the appellant Gabriel Toombs, because the special meeting of stockholders so provided for was in effect a judicial tribunal erected by the State for the purpose of exercising the judicial and discretionary act of determining whether such assessment should be levied and the bank continued in operation or should not be levied and the bank liquidated as an insolvent bank, and said statutes having made no provision whatever for notice to all the stockholders of said bank so that each stockholder as the result of such notice might attend such meeting and be heard on the question whether or not such assessment was provident or improvident, and said statutes providing that a minority of the stockholders might be authorized to levy such assessment without notice to all the [fols. 5½-7] stockholders was and is in violation of the provisions of the fourteenth amendment to the constitution of the United States by denying to the stockholders not required to be notified the due process of law which would arise from notice of such meeting.

3. The court erred in holding that the capital of said bank having been impaired $55,422.76, and in order to make an assessment sufficient to restore the capital of said bank creditors and depositors were required to write off of their claims the sum of $30,422.76, so that a levy of an assessment of 100% would restore said capital, the levy of such assessment under the facts of this case was a valid and binding and provident exercise of the power granted to a minority of the stockholders, without requiring notice to all the stockholders.

Wherefore appellant prays that said judgment of the Supreme Court of Georgia may be reversed.

W. A. Slaton, Attorney for Appellant.

[File endorsement omitted]

[fol. 8] In Superior Court of Wilkes County, May Term, 1928

No. 20

Citizens Bank of Waynesboro

vs.

Gabriel Toombs

Suit on Assessment Against Stockholders

Petition

Citizens Bank of Waynesboro, as plaintiff, brings this complaint against Gabriel Toombs, as defendant, and alleges:

1

That defendant is a resident of said county.

2

That defendant is a stockholder in plaintiff bank being the holder of Certificate No. 82 for five shares of capital stock of said bank of the par value of $100.00 per share; and Certificate No. 86 for one share of stock of the par value of $100.00, making a total of six shares of stock of the value of $600.00 par.

3

That on or about August 16th, 1926, the capital stock of said bank having become impaired, said bank was taken in charge by the State Superintendent of Banks and an appraisal of the assets and liabilities of said plaintiff bank disclosed the fact that it would be necessary to issue against its stockholders an assessment of 100 per cent.

4

That under the Act of August 26th, 1925, Article VI, Section 1 of the Banking Act of Georgia, the State Superintendent of Banks notified such bank and required such bank to make good its capital stock by an assessment upon the stockholders of said bank and acting under these in-

structions a special meeting of the stockholders of said plaintiff bank was called and held upon the 23rd day of October, 1926.

5

At such special meeting of said stockholders a majority [fol. 9] of the stock outstanding at the time was represented and the following resolution unanimously passed, to-wit:

A special meeting the stockholders of the Citizens Bank of Waynesboro, Georgia, was held this October 23rd, 1926.

Upon roll call the following stock was found to be present either in person or by proxy:

J. H. Whitehead	10 shares.
J. L. Boyd	2 shares.
H. W. Blount	2 shares.
Jno. A. Blount	2 shares.
Estate R. C. Neely	120 shares.

A majority of the stock being present this meeting was declared ready for business.

Mr. R. C. Neely, Jr., was elected Chairman and H. W. Blount Secretary.

The following resolution was introduced by Mr. Neely:

"Whereas the Citizens Bank was placed in the hands of the Superintendent of Banks on August 16th, 1926, and

Whereas an appraisal of the assets of the Citizens Bank disclosed a deficiency of assets to pay its liabilities of $55,422.76, and,

Whereas, it appears that certain depositors have contributed the sum of $30,422.76 to cover said impairment, leaving the capital stock of the Citizens Bank impaired to the extent of $25,000.00;

Now, therefore, to make good the impairment of the capital stock.

Be it resolved that under the provisions of Article VI, Section 1 of the Banking Law of the State of Georgia approved August 16, 1919, an assessment of 100% par value of stock held by each stockholder be, and the same hereby is made to make good said impairment of capital stock."

On motion of Jno. A. Blount and duly seconded the above [fol. 10] resolution was unanimously adopted.

There being no further business the meeting adjourned.

(Signed) R. C. Neely, Jr., Chm. H. W. Blount, Secy.

That said defendant, as a stockholder in said bank has failed and refused to pay the assessment which has been levied against him as aforesaid, after due notice to him as by statute required and said plaintiff bank now elects under Section 2 of Article VI of the Banking Laws of said State passed August 26th, 1926, to sue said stockholders for the full amount of said assessment, to-wit, the sum of $600.00, said assessment of 100 per cent having become absolutely necessary under the law for the purpose of making good the impairment of the stock of plaintiff bank.

Wherefore, petitioner prays that process issue, and that said defendant be served and that he be required to appear at next term of said court and answer this complaint, and that petitioner have judgment against said defendant in the principal sum of $600.00, together with interest and cost, as is provided by law.

Earle Norman, Attorney for Petitioner.

[fol. 11] In Superior Court of Wilkes County

[Title omitted]

Answer

And now comes the defendant in the above stated case and subject to his demurrer therein of file, for answer says:

1. Defendant denies the allegation of paragraph one of plaintiff's petition that he is a resident of said State and County, and says that he is and from the first day of September 1925 has been a citizen and resident of the City of Tampa in the State of Florida. This defendant does however admit the jurisdiction of this court over this defendant by reason of the acknowledgment of service by authority of this defendant, and that this court could with-

out such acknowledgment of service acquire jurisdiction of this defendant by attachment against the property of this defendant located in said county.

2. Defendant admits the allegations of paragraphs Two (2) Three (3) Four (4) Five (5) of plaintiff's petition.

3. Defendant denies the allegations of paragraph six (6) of plaintiff's petition.

4. For further plea and answer to plaintiff's petition, this defendant says that T. R. Bennett, State Superintendent of Banks, on or about August 16, 1926, took charge of plaintiff bank, that on or about Sept. 16, 1926 an assessment was levied against stockholders in said bank in the sum of 100% of the par value of said stock, that a number of the stockholders in said bank actually paid these assessment-, that executions were issued by said Superintendent of Banks against those stockholders who did not pay, and on or about the 22nd day of October, 1926, said Superintendent of Banks cancelled said assessments, returned to the drawers the checks delivered in payment of [fol. 12] such assessments, and returned the assets of said bank to the officers of said bank, and by reason of such acts this defendant is not liable to plaintiff bank for the assessment here sued for.

5. For further plea and answer this defendant says that plaintiff bank was chartered, prior to January 1, 1920, under the provisions of the Civil Code by the Secretary of State of said State, that the stockholders liability to creditors and depositors under the charter of plaintiff bank of this defendant as a stockholder in said bank was fixed and determined by section 2270 of the Civil Code of 1910, in the following language to wit: "and said stockholder shall be further and additionally liable equally and ratably and not one for another as sureties to depositors of said corporation for all moneys deposited therein in an amount equal to the face value of their stock," which said section of the Code of 1910, this defendant says was repealed by reason of the adoption of an act of the General Assembly of said State approved August 16, 1919, known as the General Banking Law, which appears in Published Laws 1919 on pages 135 et seq., and said statutory liability being so

repealed, and no other or further liability of stockholders having been provided by law, this defendant is not liable to the depositors or creditors of plaintiff bank in any sum or in any manner, and plaintiff is not entitled to recover in said action any sum.

6. For further plea and answer this defendant says that plaintiff undertakes in its petition to set forth a cause of action arising under the provisions of Sections 1, 2 and 3 of Article VI of an act of the General Assembly of Georgia approved August 16, 1919, known as the General Banking Law, as amended by subsequent acts of the General Assembly, that this defendant is a non-resident of said State, [fol. 13] and a resident of the State of Florida and was a resident of the State of Florida at the time the alleged assessment was made; that this defendant was not present and did not participate in the levy of said assessment; that the statutes under which plaintiff undertakes to proceed provide for no notice to this defendant, they provide for no opportunity for this defendant to be heard on the question whether such assessment shall be levied, and said statutes failing to provide for notice and an opportunity to be heard violate the provisions of paragraph three (3) of Section one (1) of Article one (1) of the Constitution of this State and of the fourteenth amendment to the Constitution of the United States by denying to this defendant due process of law.

Wherefore defendant prays that he be hence dismissed with his reasonable costs and damages.

W. A. Slaton, Counsel for Defendant.

[fol. 14] In Superior Court of Wilkes County

Judgment—Oct. 9, 1928

The within stated case was submitted to the Court on July 28, 1928, under an agreed statement of facts, for decision without the intervention of a jury—an order to that effect having been passed at the regular May Term 1928 of the Superior Court of Wilkes County—and I reserved my decision till this date.

It is considered, ordered and adjudged by the Court that the plaintiff, Citizens Bank of Waynesboro, do have and recover of the defendant, Gabriel Toombs, the sum of $600.00 principal, together with interest thereon at the rate of 7% per annum, from Oct. 23, 1926, to the date of this judgment and future interest on the principal at the same rate, and the further sum of — Dollars as cost of court.

This the 9th day of Oct. 1928.

C. J. Perryman, J. S. C. T. C.

[fol. 15] In Superior Court of Wilkes County

[Title omitted]

Demurrer

And now comes the defendant in the above stated case and demurs to plaintiff's petition therein of file and for grounds of such demurrer says:

1. That no cause of action is set forth in plaintiff s petition.

2. That plaintiff is not entitled to a personal judgment against this defendant because by reason of the provisions of Article VI Sec. 3. of the Banking Act of 1919, appearing on page 153 of the Published Laws of Georgia, 1919, the remedy of plaintiff is limited for the enforcement of the assessment sued for to a sale of a sufficient portion of the stock held and owned by this defendant to pay said assessment, and plaintiff is not entitled to a personal judgment against this defendant.

3. Because to enforce the cause of action sought to be alleged and set out in plaintiff's petition would be in violation of the provisions of Paragraph 3 of Section 1 of Article 1 of the Constitution of this State because to permit the recovery of a personal judgment against this defendant would be to deprive this defendant of his property without due process of law, this defendant not having participated in, agreed to, or been permitted an opportunity to contest the levy of said assessment before or at the time the same was made.

4. Because to enforce the cause of action sought to be set out in plaintiff's petition would be in violation of the provisions of paragraph 1, of section 3 of Article 1 of the Constitution of this State, because to permit the recovery of a personal judgment against this defendant would be to take the private property of this defendant for public purposes without just and adequate compensation being first paid.

[fol. 16] 5. Because the personal liability of this defendant as a stockholder in said bank being limited to an assessment by the Superintendent of Banks not exceeding 100% of the stock held by this defendant, to permit the collection of the assessment here sued for, would be to double the assessment for which this defendant is legally liable, and in the event plaintiff bank was unsuccessful in its efforts to continue its business, this defendant would be liable for the additional assessment by the State Superintendent of Banks in an amount equal to 100% of the par value of the stock held by him, which said additional liability is not a liability imposed on this defendant by the laws of said state.

6. Because sections one (1) two (2) and three (3) of Article VI of the act of 1919, approved Aug. 16, 1919, known as the General Banking Law, as they appear on pages 152 and 153 of Published Laws 1919, as amended by an act approved Aug. —, 1925, and appearing on pages 119, 126, 127 and 128, Published Laws 1925, under which said laws the cause of action set forth in plaintiff's petition is sought to be maintained are unconstitutional and void, in that they contravene the provisions of paragraph three of section one of article one of the constitution of this state and the fourteenth amendment to the Constitution of the United Sates in that said acts deprive this defendant of his property without due process of law because said laws by providing that a majority of the outstanding capital stock of the corporation may hold a valid meeting for the purpose of making an assessment against all the stockholders, and at such special meeting of stockholders, *and at such special meeting of stockholders* a majority of the stock present and voting may levy such a ssessment, against stockholders present and against stockholders not present, in effect pro-

vides that a minority of the stock in said bank may levy such assessment, and because said laws provide for no no-
[fol. 17] tice to stockholders and provide for no hearing either before the stockholders meeting or the officers of said bank and for no legal determination of the necessity for or wisdom of such assessment and stockholders who are not present and voting at such meeting are provided no remedy against an illegal or improvident assessment in any tribunal, and because said statutes provide for no notice of any kind to this defendant, and for no hearing by him and provide for no remedy to this defendant against an improvement and an illegal assessment, no due process of law for determination the rights of this defendant, said acts are unconstitutional, null and void.

7. Because, it appearing from plaintiff's petition that on or about August 16th 1926, the State Superintendent of Banks took charge of plaintiff bank under the statute in such case made and provided because the capital stock of said bank had become impaired to the extent of 100% of said capital stock, and the legal liability of this defendant established under section 2770 of the Civil Code 1910 or under Section 1 of Article XVIII of the Banking Act of 1919, as the same appears in Published Acts 1919 on page 189, whichever act may apply, being limited to 100% of the par value of the stock held and owned by this defendant, upon the taking charge of said bank by said State Superintendent of Banks, the return of said bank to the stockholders and the assessment of this defendant by the stockholders was illegal and without authority of law, because the only remedy against this defendant and for which this defendant was liable to respond was the assessment by the State Superintendent of Banks, and the stockholders from and after that time had no right or authority to levy any assessment against this defendant.

8. Because, it appearing from the allegations of plaintiff's petition that the capital stock of plaintiff bank was
[fol. 18] $25,000.00 that the impairment of the capital of plaintiff bank equaled $55,422.75, and that the difference between said deficiency and the maximum assessment permitted by law was made up by a writing off and discharge of a part of the indebtedness due depositors, the only

remedy provided by law was an administration of the assets of said bank by the State Superintendent of Banks, and plaintiff Bank could not by so procuring the writing off of its liabilities assess against this defendant the liability sought to be imposed by this assessment, this defendant's liability to creditors being limited by law to 100% of the par value of the stock held by him, and by the process pursued by plaintiff bank his liability being increased to 200% of the par value of such stock.

Wherefore defendant prays that he — so hence discharged with his reasonable costs and damages.

W. A. Slaton, Counsel for Defendant.

[fols. 19 & 20] In Superior Court of Wilkes County

Order Overruling Demurrer

TLe within demurrer came on regularly to be heard before me, on July 28, 1928, a previous order to that effect having been passed at the regular May Term 1928, of the Superior Court of Wilkes County, and I reserved my decision till this date.

It is considered, ordered and adjudged by the Court that said demurrer be, and the same is hereby, overruled on each and every ground thereof.

This the 9th day of October 1928.

C. J. Perryman, J. S. C. T. C.

[fol. 21] In Superior Court of Wilkes County

Bill of Exceptions—Filed Oct. 16, 1928; in Supreme Court, Oct. 19, 1928

State of Georgia,
Wilkes County:

Be it remembered, that heretofore, to wit, on the 28th day of July, 1928, in pursuance of an order taken at the regular May Term 1928 of the Superior Court of Wilkes County,

there came on to be heard before the Honorable C. J. Perryman, Judge of said Court, in vacation, without the intervention of a jury, with authority to hear and determine all questions of law and of fact a cause wherein Citizens Bank of Waynesboro was plaintiff and Gabriel Toombs was defendant, the same being a suit upon a stockholders assessment made by the stockholders of said bank against said Toombs as one of the stockholders, which said cause having been submitted to the court, his decision was reserved until the 9th day of October 1928, on which day a judgment was rendered by the court overruling defendant's demurrer to plaintiff's petition overruling said demurrer on each and every ground thereof, to which said judgment of the court overruling said demurrer defendant excepted, excepts, and now assigns the same as error and for grounds of such error says that said judgment of the court is contrary to law and the court erred in overruling said demurrer upon each and every of the grounds of said demurrer therein set forth.

At the same time and place, the following agreed statement of facts was submitted to the court, to wit:

AGREED STATEMENT OF FACTS

Citizens Bank of Waynesboro was incorporated under the General Banking Law, prior to January 1, 1920, Toombs was the owner of six shares of stock of the par value of $600.00, on August 16, 1926, Toombs was, and is now a resident of the city of Tampa, in the State of Florida, having removed there from Washington Ga., and on that date the bank having become insolvent, was taken charge of by T. R. Bennett, State Superir. endent of Banks, who promptly levied an assessment of 100% on the stockholders. [fol. 22] The capital stock of the bank was $25,000, and the impairment of the capital amounted to $55,422.76. Certain depositors agreed to write off from their claims against the bank the sum of $30,422.76, leaving the impairment of the capital equal to the capital stock, and the superintendent of Banks having issued executions against the stockholders for 100% of their stock, then agreed to withdraw this assessment, and turn over the bank to its stockholders, provided they would levy an assessment sufficient in amount to cover the impairment of the capital, which was equal to

100% of the stock. On Oct. 23, 1926, a stockholders meeting was held at which 136 shares of a total of 250 shares of stock were represented, when the assessment was levied under the resolution set out in full in paragraph 5 of plaintiff's petition, which is made by this reference a part of this statement of facts. The State Superintendent of Banks then cancelled his assessments by the following letter written to each of the stockholders:—

With the co-operation of its depositors, the Citizens Bank of Waynesboro, Georgia, has completed its plans to reopen and resume business.

Before these plans were worked out an assessment of 100% on the stockholders was levied by the Superintendent of Banks for the purpose of paying depositors. It having been determined to reopen the bank, this assessment is hereby recalled and vacated.

Checks covering the amounts paid by the stockholders on account of this assessment have been mailed to the liquidating agent of the bank at Waynesboro, and will be delivered to the stockholders upon request.

The executions which have been issued against the stockholders who have not paid their assessments are being cancelled of record.

This letter was dated Oct. 22, 1926.

[fol. 23] Toombs, the defendant did not attend the stockholders meeting at which the stockholders assessment was levied, has not paid any sum on that account, and has not attended any sort of meeting of stockholders, directors or officers of the bank since that time, and is not a director or officer. Toombs is the owner of property in Wilkes county, Ga. and admits the jurisdiction of this court for the purpose of determining his liability for assessment in this case.

This bank was never in process of liquidation. Under a working agreement between the officials of the Bank and the State Superintendent of Banks it was merely placed in the hands of the department of banking for preservation until some definite plan could be worked out, and in order to accomplish the same, the assessment was levied 100% on each stockholder.

After the Superintendent of Banks of Georgia and the directors and officers of Citizens Bank of Waynesboro had

had time to work out a plan for this bank, the Superintendent of Banks notified the officers and directors of Citizens Bank of Waynesboro under section 1 Article 2 of the Banking Act of Georgia that the capital stock of the bank had become impaired, and required to make good its impairment within sixty days by an assessment upon stockholders, and immediately upon such notice being received from Superintendent of Banks a special meeting of the stockholders was called by officers of the bank. The following is a true copy of the minutes of the meeting of directors of Citizens Bank of Waynesboro held on Oct. 8, 1926, to wit:

Directors of Citizens Bank of Waynesboro met in call meeting Friday evening October 8th 1926, those present being R. C. Neely, Jr., A. W. Neely, J. L. Boyd, J. A. Blount, and H. W. Blount.

The purpose of the meeting was stated by H. W. Blount [fol. 24] to be as follows: The Superintendent of Banks having given notice that the capital of the Citizens Bank of Waynesboro has become impaired and having directed that a call meeting of the stockholders be had for the purpose of making an assessment to cover said impairment.

It was moved by H. W. Blount, seconded by A. W. Neely and carried "That a call meeting of the stockholders of the Citizens Bank of Waynesboro be had on October 23rd 1926, to consider an assessment to cover the impairment of the capital stock of said bank."

It was moved by J. L. Boyd seconded by J. A. Blount and carried that the cashier of said bank H. W. Blount give immediate notice of the call of the stockholders meeting to the various stockholders.

There being no further business the meeting adjourned.

The following notice of stockholders meeting was properly addressed to Gabriel Toombs, Washington, Georgia, the last address of said Toombs with said Bank, stamped and placed in the post office at Waynesboro, Georgia, by W. H. Blount cashier of Citizens Bank of Waynesboro and the envelope in which this notice was enclosed had on the face thereof the following language to wit: After five days return to Citizens Bank of Waynesboro, Lock Drawer A,

Waynesboro, Burke County, Georgia." This letter was never returned to Citizens Bank of Waynesboro. The envelope in which notice was enclosed was addressed as follows: "Mr. Gabriel Toombs, Washington, Georgia, and as above stated properly stamped and placed in post office at Waynesboro, Georgia by H. W. Blount, Cashier of said Bank.

Following is a copy of notice mailed to said Toombs:

October 8, 1926.

Mr. Gabriel Toombs, Washington, Georgia.

Dear Sir: You are hereby notified that pursuant to a directors meeting held this date, there will be a stockholders [fol. 25] meeting of the Citizens Bank of Waynesboro, held in the offices of said bank on the 23rd day of October, 1926.

The purpose of the meeting is to make a stock assessment to cover an impairment in the capital stock of said bank.

You will please appear in person or by proxy.

Yours very truly, H. W. Blount, Cashier.

On October 23, 1926, the meeting of stockholders of said bank was held as set forth in paragraph 5 of plaintiff's petition.

Which said agreed statement of the facts, including paragraph numbered "5" of plaintiff's petition as a part thereof by reference thereto, having been considered by the court, on said 9th day of October, 1928, a judgment was rendered by the court in favor of plaintiff Citizens Bank of Waynesboro and against defendant Gabriel Toombs, to which said judgment of the court defendant excepted, excepts and now assigns the same as error and for grounds of such error says:

Assignments of Error

1. That said judgment is contrary to law.

2. That said judgment is contrary to the evidence and entirely without evidence to support it, thereby being contrary to law.

3. That said judgment is contrary to law, because it appearing from the undisputed facts in the record that the

State Superintendent of Banks had taken charge of said plaintiff bank as an insolvent bank, and had levied an assessment of 100% on said stockholders, as an insolvent bank, and said bank being in fact insolvent to such extent that an assessment of 100% on said stockholders would not pay the indebtedness of the bank by $30,422.76, the cancelling of said assessment and the levy of an assessment by the stockholders was contrary to law because such assess- [fol. 26] ment does not relieve defendant of further liability upon the taking charge of said bank by the State Superintendent of Banks at some future time.

4. That said judgment is contrary to law because it appears from the undisputed evidence that the capital stock of said bank being $25,000.00 and the deficiency of assets of said bank being $55,422.76, the assessment made by said stockholders was and is an assessment which is insufficient to restore the solvency of said bank, that the making of such assessment is unwise, and because of its unwisdom is not an exercise of proper discretion on the part of the stockholders participating in said stockholders meeting, but is an arbitrary assessment made by said stockholders against all the stockholders.

5. That said judgment is contrary to law because the said bank having been chartered under the general banking law of 1893, the stockholders liability fixed by the charter of said bank was repealed by the Banking law of 1919, and no other liability by said stockholders was fixed by said Banking law of 1919, and defendant was not and is not liable for said assessment.

6. That said judgment is contrary to law because the statute under which plaintiff undertook to levy said assessment provides for no notice to stockholders, provides no opportunity for stockholders to be heard on the question whether or not said assessment shall be levied, and said statute providing for no notice or opportunity to be heard are unconstitutional and void because in violation of paragraph three (3) of section one (1) of Article one (1) of this state, and of the fourteenth amendment to the Constitution of the United States.

PRECIPE FOR TRANSCRIPT OF RECORD

Defendant specifies as material to a clear understanding of the errors complained of the following parts of the record:

1. Plaintiff's petition.

[fols. 27 & 28] 2. Defendant's answer, and the judgment of the court.

3. Defendant's demurrer and the order overruling it.

And now within the time required by law comes the defendant and presents this his bill of exceptions and prays that the same may be signed and certified that the errors complained of may be reviewed and corrected.

W. A. Slaton, Counsel for Plaintiff in Error.

P. O. Washington, Ga.

[fol. 29] IN SUPREME COURT OF GEORGIA

JUDGMENT—September 24, 1929

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

6876

GABRIEL TOOMBS

v.

CITIZENS BANK OF WAYNESBORO

This case came before this court upon a writ of error from the Superior Court of Wilkes county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur, except Russell, C. J., and Atkinson, J., who dissent.

[fol. 30] IN SUPREME COURT OF GEORGIA

TOOMBS

v.

CITIZENS BANK OF WAYNESBORO

OPINION—September 24, 1929

HINES, J.:

1. The Citizens Bank of Waynesboro was chartered on February 2, 1898, under the act of December 20, 1893, which provided a general method for the incorporation of banks by the Secretary of State. Acts 1893, p. 70; Civil Code (1910), §§ 2262 et seq.; 9th Annual Report of Department of Banking, p. 170. Stockholders in a bank chartered under this act were made liable for all of the debts of the bank to the extent of their unpaid shares of stock, and were further additionally made individually liable equally and ratably, and not one for another as sureties, to depositors of said bank for all moneys deposited therein, in an amount equal to the face value of their respective shares of stock, it being the true intent and purpose of said act that, as to depositors of all moneys deposited in said banks, there should be an individual liability upon the stockholders therein over and beyond the par value of their original shares of stock, equal in amount to the face value thereof. Acts 1893, pp. 70, 72; Civil Code (1910), § 2270.

2. The above liability of stockholders to depositors of this bank was not repealed by section 1 of article 21 of the general banking act of 1919 (Acts 1919, pp. 135, 222), which provides that "This act shall take effect from and after the 1st day of January, 1920, and shall then supersede all existing laws regulating banks and banking in this State." The language, "shall then supersede all existing laws regulating banks and banking in this State," cannot properly be construed as relieving stockholders in a bank from a liability imposed upon them by the general act of 1893, [fol. 31] under which it was chartered.

3. By the act of December 16, 1895, it is provided that "when the bank examiner or assistant bank examiner finds that the capital stock of any bank chartered under the laws

of this State has become impaired or reduced from losses or any other source, the bank examiner shall require such bank to make good its capital stock so impaired or reduced, by a transfer from its surplus or undivided profits * * * to the capital stock [of] a sum sufficient to make good such impairments or reductions; and if there is no surplus or undivided profits, or not enough to make good said capital stock, then by an assessment upon the stockholders thereof." Acts 1895, p. 58; Civil Code (1895), § 1926. This act having been passed prior to the grant of the charter of the Citizens Bank of Waynesboro, its terms must be read into the charter thereof; and its stockholders were thereby made liable for assessments to make good the impairment or reduction of its capital stock under the circumstances stated therein. Besides, this liability of stockholders in a bank to make impairment of its capital stock good has been continued in the subsequent acts regulating banks and banking in this State. Acts 1907, p. 85; Civil Code (1910), § 2291; Acts 1919, pp. 135, 152; Acts 1925, pp. 119, 125.

4. Sections 1, 2, and 3 of article 6 of the act of August 16, 1919, creating the department of banking (Acts 1919, pp. 135, 152), as amended by the act of August 26, 1925 (Acts 1925, pp. 119, 126), are not unconstitutional and void because they violate the due-process clauses of the State and Federal Constitutions, in cases when assessments are made against stockholders under section 1 of said article, and suit is brought under section 2 thereof to recover such assessments, as the stockholder can set up any legal defense which he may have to the suit for the collection of [fol. 32] said assessment. Whether so much of section 2 of said article which gives to the directors of such bank the right to sell to the highest bidder, at public outcry for cash, a sufficient amount of the stock of such stockholder to recover the assessment, after giving previous notice of such sale, as therein provided, where the stockholder refuses or neglects to pay the assessment, is unconstitutional because it violates the due-process clauses of the State and Federal constitutions, is not now for decision.

5. By section 6 of article 7 of the act of August 16, 1919 (Acts 1919, pp. 135, 156), it is provided that after the superintendent of banks has taken possession of any bank,

he may permit such bank to resume business upon such conditions as may be approved by him. The Citizens Bank of Waynesboro became insolvent and was taken charge of by the superintendent of banks, who levied an assessment of 100 per cent. on the stockholders. The capital stock of the bank was $25,000. The impairment of its capital amounted to $55,422.76. Certain depositors agreed to write off from their claims against the bank the sum of $30,422.76, leaving the impairment of the capital equal to the capital stock. The superintendent of banks, having issued execution against the stockholders for 100 per cent. of their stock, agreed to withdraw this assessment and turn the bank over to its stockholders, provided they would levy an assessment sufficient in amount to cover the impairment in the capital, which was equal to 100 per cent. of the stock. On October 23, 1926, a stockholders' meeting was held, at which 136 of the 250 shares of the stock of the bank were represented, and an assessment of 100 per cent. of the capital stock was levied, as set out in the petition in this case. The superintendent of banks then canceled his assessments and the executions issued therefor. We hold that the stockholders' assessment to restore the impaired capital of the bank was [fols. 33-40] not improvident under these facts, as such assessment restored the capital of the bank.

6. The writing off by certain depositors of $30,422.76, due by the bank to them on deposits, to enable this bank to continue business, was not illegal for any reason appearing from the record.

7. Other assignments of error are not argued or insisted upon in the brief of counsel for the plaintiff in error, and for this reason they will be treated as abandoned. Mack v. Felt, 166 Ga. 705. The question whether stockholders in a bank who have been once assessed to restore its impaired capital stock can again be assessed for such purpose is not now for decision. Applying the principles above ruled, the court did not err in overruling the demurrer to the petition and in rendering judgment for the plaintiff, under the pleadings and an agreed statement of facts.

8. The former judgment of this court in this case, reversing the judgment of the court below, having been with-

drawn for further consideration, the same is hereby set aside. In rendering such former decision this court overlooked the act of 1895, which subjected the stockholders of this bank, which was chartered after the passage of said act, to an assessment to restore its impaired capital stock.

Judgment affirmed. All the Justices concur, except Russell, C. J., and Atkinson, J., dissenting.

[fol. 41] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED.—Filed Nov. 23, 1929

The appellant by Clement E. Sutton and W. A. Slaton his attorneys presents the following statement of errors upon which appellant intends to rely in the above case and of the parts of the record which appellant thinks necessary for the consideration thereof:

1. That Sections 1, 2, and 3, of Article VI, of the Act of August 16, 1919, creating the department of banking of the State of Georgia, as amended by the Act of August 26, 1925, of the State of Georgia, are unconstitutional and void because they violate the due process clause of the constitution of the United States, to wit the fourteenth amendment to the constitution of the United States because said sections do not provide for notice to be given to each stockholder of the bank of the special meeting of stockholders at which assessments provided for in said sections of said statutes are required to be made.

2. That the assessment actually made by the stockholders under the circumstances of the assessment, was improvident and void, because it did not restore the capital of said bank.

Appellant also states that he considers the following parts of the record necessary for the consideration of the errors on which he intends to rely, to wit:

Page- 4-5. The entire assignment of errors.

Page- 8-10. The petition in the lower court. Print the entire petition, but omitting the process, filing and acknowledgment of service.

Page- 11-14. The answer in the lower Court. Print entire answer.

Page- 15-19. The demurrer in the lower court. Print entire demurrer.

Page- 21-29. The bill of exceptions. Print the entire bill of exceptions, omitting the certificates of the judge and clerk and entries of filing.

Page 30. The opinion of the Supreme Court of Georgia, [fol. 42] omitting from the opinion the statement of facts at the end thereof as a mere restatement of the facts contained in the bill of exceptions.

The judgments of the lower court and of the Supreme Court of Georgia being merely formal, in favor of appellee below, need not be printed.

Respectfully submitted.

Clement E. Sutton, W. A. Slaton, Attorney for Appellant.

Due and legal service of the above and foregoing statement of errors on which appellant intends to rely, and designation of the parts of the record to be printed, acknowledged Nov. 21, 1929.

Ed Morrow, Attorney for Appellee.

[fol. 43] [File endorsement omitted.]

Endorsed on cover: File No. 34,616. Georgia Supreme Court. Term No. 485. Gabriel Toombs, appellant, vs. Citizens Bank of Waynesboro. Filed November 18, 1929. File No. 34,616.